

STATE OF MICHIGAN  
COURT OF APPEALS

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DENNIS ANTHONY BUTLER, D.D.S.,

Appellant,

v

BUREAU OF HEALTH PROFESSIONS,

Appellee.

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UNPUBLISHED

April 12, 2011

No. 295261

Board of Dentistry

LC No. 2008-001064

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Appellant Dennis Anthony Butler, D.D.S., appeals as of right an order of the Michigan Department of Community Health (MDCH), Bureau of Health Professions Disciplinary Subcommittee (DSC). The DSC adopted the findings of fact and conclusions of law made by a hearing referee, ruled that Butler had violated Michigan Administrative Code health profession disciplinary Rule 32, 1996 AC, R 338.1632,<sup>1</sup> and § 16221(h) of the Public Health Code (PHC),<sup>2</sup> MCL 333.1101 *et seq.*, and placed him on probation for two years. We affirm.

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<sup>1</sup> According to Rule 32, “Violation of a final order issued by a disciplinary subcommittee, board, or task force constitutes a violation of this rule.” 1996 AC, R 338.1632.

<sup>2</sup> MCL 333.16221(h) reads:

The department may investigate activities related to the practice of a health profession by a licensee, a registrant, or an applicant for licensure or registration. The department may hold hearings, administer oaths, and order relevant testimony to be taken and shall report its findings to the appropriate disciplinary subcommittee. The disciplinary subcommittee shall proceed under [MCL 333.16226 (authorizing sanctions)] if it finds that 1 or more of the following grounds exist:

\* \* \*

(h) A violation, or aiding or abetting in a violation, of this article or of a rule promulgated under this article.

In 2005, the MDCH filed an administrative complaint alleging that Butler had negligently and incompetently performed several procedures on a patient. In November 2006, the parties submitted to the DSC a proposed consent order, which took effect on April 12, 2007. Under the consent order, Butler agreed to his placement on probation for a two-year period, that he would pay a \$1,000 fine, and that he would successfully complete a Jurisprudence, Ethics and Risk Management (JERM) examination. The consent order additionally obligated Butler to (1) contact the MDCH within 30 days to obtain the name of a designated monitor with whom he would meet quarterly for a review of his professional practice, beginning “at the end of the third month of probation,” and (2) successfully complete, within six months of the order’s effective date, continuing education courses in four specified areas, “under the auspices of Dr. Persiani of the University of Detroit School of Dentistry, or any other dentist or school of dentistry approved by the Board conferee.”

Butler paid the fine, but failed to contact the MDCH within 30 days. On July 23, 2007, the MDCH sent Butler a letter reminding him of his responsibility to contact Dr. Solomon Pesis, D.D.S., the board-designated monitor. On October 11, 2007, Dr. Pesis returned Butler’s file to Rhonda Hennessy, the Board of Dentistry Chairperson, because Butler had not yet contacted Pesis. On October 26, 2007, the MDCH again contacted Butler by letter, reiterating that he had not complied with the terms of his probation because he made no arrangements for quarterly practice reviews or to propose or complete continuing education coursework. The MDCH directed Butler to submit proposed coursework and contact Hennessy by November 9, 2007, and advised that his failure to do so would result in further disciplinary action.

On November 7, 2007, Butler spoke with Hennessy, who instructed him to call Persiani regarding his continuing education courses. Butler testified that he immediately called Persiani’s office, but Persiani was out of the country. Butler agreed to meet with Hennessy on November 16, 2007 for the first of the quarterly practice reviews mandated by the consent order; however, the day before the scheduled meeting, Butler apprised Hennessy that the meeting could not occur at his office because the owner of the dental practice would not permit it. Hennessy concluded that Butler was not attempting to comply with his probationary terms, so she turned his file back over to the MDCH. Soon thereafter, Butler learned that Persiani no longer provided supervisory services to the MDCH.

In January 2008, the MDCH filed a second administrative complaint, asserting that Butler did not comply with the 2007 consent order because he “has failed to meet with the designated Board member and failed to complete any of the required continuing education courses” by October 12, 2007, in contravention of Rule 338.1632 and MCL 333.16221(h). After a hearing, the hearing referee concluded that the MDCH’s October 26, 2007 letter effectively extended to November 9, 2007 the deadline for Butler to contact the board-designated monitor and submit proposed coursework; that Butler’s refusal to meet with Hennessy at his office did not amount to a violation of the consent order, which merely stated that Butler remained “responsible for scheduling the time and place of the meetings”; but that Butler’s failure to submit proposed coursework by November 9, 2007 constituted a violation of the consent order’s continuing education requirement. The DSC adopted the hearing referee’s findings and conclusions and ordered two more years of probation, as well as additional continuing education and professional practice review requirements.

Judicial review of a disciplinary subcommittee's order under Article 15 of the PHC, MCL 333.16101 *et seq.*, is limited to ascertaining whether "competent, material and substantial evidence on the whole record supports the order." *Dep't of Community Health v Risch*, 274 Mich App 365, 370-371; 733 NW2d 403 (2007), quoting Const 1963, art 6, § 28. This Court must review the entire record and not just the portions supporting an agency's findings. *Risch*, 274 Mich App at 372; *VanZandt v State Employees' Retirement Sys*, 266 Mich App 579, 588; 701 NW2d 214 (2005). "Substantial" evidence signifies a quantum of proof that, after a thorough review of the entire record, "a reasonable mind would accept as sufficient" to support the agency's factual findings; substantial evidence "consists of more than a scintilla of evidence, [but] it may be substantially less than a preponderance." *In re Payne*, 444 Mich 679, 692-693; 514 NW2d 121 (1994); see also *Risch*, 274 Mich App at 372. When sufficient evidence supports a disciplinary subcommittee's decision whether to impose a sanction, this Court may not reverse "merely because alternative findings also could have been supported by substantial evidence on the record." *Payne*, 444 Mich at 692.

We conclude that the DSC's decision that Butler violated the consent order's continuing education mandate rests on substantial evidence in the whole record. The consent order's continuing education provision required Butler to "successfully complete" continuing education courses in four specified areas within six months of the order's effective date. Moreover, the order plainly placed on Butler the onus to "seek and obtain advance approval" of these courses from the DSC chairperson or a designee, and mail to the MDCH requests for course approval and proof of successful course completions. Butler concededly did none of these things.

Butler nevertheless challenges the DSC's determination as unsupported by the record on the basis that the MDCH neglected to designate a monitor within three months after issuance of the consent order and then failed to timely identify a substitute monitor after Dr. Pesis resigned, rendering Butler unable to obtain preapproval for his courses. Citing *Goldblum v United Auto, Aircraft & Agricultural Implement Workers of America, Ford Local No 50*, 319 Mich 30; 29 NW2d 310 (1947), Butler avers that the MDCH "waived a strict requirement as to time by failing to designate a monitor." The Supreme Court in *Goldblum* noted that "[i]f the parties mutually adopt a mode of performing their contract differing from its strict terms . . . or if they mutually relax its terms," neither party may claim a breach if the contract is not performed precisely according to its terms. *Id.* at 37 (internal quotation omitted). In this case, however, the hearing referee correctly found that, contrary to Butler's suggestion, the continuing education requirement did not depend on meeting with the designated monitor. Instead, the consent order simply required that Butler *mail* his requests for course approval to a specified address. Furthermore, Butler's suggestion that the MDCH unfairly attempted to enforce the "strict terms" of the consent order rings hollow in light of Butler's absolute failure to comply, the MDCH's numerous attempts to remind him of his obligations, and the MDCH's grant of an extension of the period for completing those obligations.

Butler additionally complains that the consent order erroneously named Persiani as the appropriate contact for assistance with the continuing education obligation. However, while the consent order referred to Persiani as a proposed coursework supervisor, the order unambiguously envisions that "*any other dentist or school of dentistry approved by the Board conferee*" could give the appropriate guidance. (Emphasis added). And Butler took no steps to contact Persiani until November 7, 2007, *after* the expiration of the six-month period for completion of the

courses designated in the consent order. Although the MDCH granted Butler an unsolicited extension until November 9, 2007 to submit proposed coursework, Butler made no effort to procure a suitable substitute for Persiani or contact the MDCH for assistance by that date or thereafter.

Butler lastly suggests that he attempted to comply with the continuing education requirement before the consent order's issuance by giving an assistant attorney general a list of proposed courses. We find amply supported in the record the hearing referee's conclusion that this letter did not satisfy the terms of the consent order, which expressly mandated that Butler forward requests for course approval by mail to the MDCH at a stated address. Moreover, three of the courses proposed by Butler took place in February 2007 and March 2007, yet he neither attended the courses nor took any further action to obtain approval for those or any other courses.

In summary, the evidence establishes that Butler undertook no steps whatsoever to contact the MDCH regarding his consent order obligations or otherwise attempt to satisfy those obligations until November 2007, *after* the expiration of the six-month window in the order for completing the continuing education courses. Butler failed to comply with the continuing education term even after the MDCH awarded him an extension to do so. Because sufficient evidence supported the DSC's determination to sanction Butler, we must defer to the administrative tribunal's exercise of its discretion. *Payne*, 444 Mich at 692-693; *McBride v Pontiac Sch Dist (On Remand)*, 218 Mich App 113, 123; 553 NW2d 646 (1996).

Affirmed.

/s/ Deborah A. Servitto  
/s/ Elizabeth L. Gleicher  
/s/ Douglas B. Shapiro